# Jaya Harapan Development (PJ) Sdn Bhd v Koperasi Kasuma (M) Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S7–21–37 OF 2001
AZMAN ABDULLAH JC
11 FEBRUARY 2008

*Civil Procedure — Adjournment — Application for — Case fixed for hearing — Application not informed earlier to court as well as defendants — Whether plaintiff's action caused prejudices to defendants — Whether plaintiff's action had abused court process — Whether circumstances warranted case to be struck off*

The plaintiff alleged that the first defendant had used the power of attorney without their knowledge and/or permission and succeeded in making the first defendant to transfer the properties to the second defendant. They alleged that the said power of attorney did not give the first defendant whether express or implied authority to sell or to transfer any of the said properties or any parts of it. The plaintiff's case had been prolonged since 1995. On 26 November 2007 ie the hearing date, the plaintiff's solicitors requested for an adjournment of the case on the ground that the plaintiff was unable to proceed with this action against the defendants because the plaintiff did not have the information as to when the properties were sold to the third party and further, the first defendant was still in the process of liquidation. The plaintiff's solicitors informed the court that they were appointed in June 2007.

**Held**, striking off the plaintiff's action against the defendants with costs:

(1) The plaintiff's solicitors should apply for an adjournment much earlier to the court and not make such an application on the date of the hearing. The newly appointed solicitors should get the cause papers and related documents from the plaintiff's previous solicitors in ensuring that this action could go on as soon as possible. This was a clear case to be struck off from the hearing list, unless the plaintiff took a proactive step to be ready to proceed with the full hearing as fixed by the court (see paras 26–27 & 30).

(2) The plaintiff's solicitors were indifferent and not serious with this case. Their attitude also reflected that the plaintiff was not serious to comply

with the court's instructions and choose to apply for an adjournment on the date fixed for hearing. The plaintiff's solicitors' attitude in not informing the court as well as the defendants earlier had caused prejudices to the defendants. The plaintiff's action had abused the court process and the court's time. The court must be firm in order to avoid more party to continue with this kind of attitude and at the same time it was the duty of the court to reduce the prevailing backlog of cases (see paras 28–29).

**[Bahasa Malaysia summary**

Plaintif telah mendakwa bahawa defendan pertama telah menggunakan surat kuasa wakil tanpa pengetahuan dan/atau kebenaran mereka dan telah berjaya membuatkan defendan pertama memindahkan harta-harta tanah kepada defendan kedua. Mereka telah mendakwa bahawa surat kuasa wakil tersebut tidak memberikan defendan pertama kuasa sama ada secara jelas atau tersirat untuk menjual atau untuk memindahkan mana-mana harta-harta tanah atau mana-mana bahagian daripadanya. Kes plaintif telah berlanjutan semenjak 1995. Pada 26 November 2007, iaitu tarikh pendengaran, peguamcara plaintif telah memohon untuk satu penangguhan kes tersebut atas alasan bahawa plaintif tidak dapat meneruskan dengan tindakan ini terhadap defendan-defendan kerana plaintif tidak mempunyai maklumat berkenaan dengan bila harta-harta tanah tersebut telah dijual kepada pihak ketiga dan seterusnya, defendan pertama masih dalam proses pembubaran. Peguamcara plaintif telah memberitahu mahkamah bahawa mereka telah dilantik pada Jun 2007.

**Diputuskan**, membatalkan tindakan plaintif terhadap defendan-defendan dengan kos:

(1) Peguamcara plaintif seharusnya memohon untuk penangguhan terlebih awal kepada mahkamah dan tidak membuat permohonan sedemikian pada tarikh pendengaran. Peguamcara yang baru dilantik seharusnya mendapatkan kertas-kertas kausa dan dokumen-dokumen yang berkaitan daripada peguamcara plaintif yang terdahulu dalam memastikan tindakan ini boleh diteruskan secepat mungkin. Ini adalah kes yang jelas untuk dibatalkan daripada senarai pendengaran, melainkan plaintif mengambil langkah yang proaktif dengan bersedia untuk meneruskan dengan pendengaran penuh seperti mana yang telah ditetapkan oleh mahkamah (lihat perenggan 26–27 & 30).

(2) Peguamcara plaintif adalah tidak mengambil endah dan tidak serius dengan kes ini. Sikap mereka juga mencerminkan bahawa plaintif tidak serius untuk mengikuti arahan mahkamah dan memilih untuk

memohon satu penangguhan pada tarikh yang telah ditetapkan untuk pendengaran. Sikap peguamcara plaintif yang tidak memberitahu mahkamah begitu juga defendan-defendan terlebih dahulu telah mengakibatkan prejudis terhadap defendan-defendan. Tindakan plaintif telah menyalah gunakan proses mahkamah dan masa mahkamah. Mahkamah perlu bertegas bagi mengelakkan lebih banyak pihak meneruskan dengan sikap begini dan pada masa yang sama adalah tugas mahkamah untuk mengurangkan tunggakan kes-kes (lihat perenggan 28–29).]

**Notes**

For cases on application for an adjournment, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 186–197.

**Cases referred to**

*Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129 (refd)
*Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana* [1982] 1 MLJ 77 (refd)
*Tian Yan Onn Development Sdn Bhd v National Holdings Ltd & Ors* [1988] 2 MLJ 669 (refd)
*Trustees ff Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin* [1998] 4 MLJ 373 (refd)

**Legislation referred to**

Companies Act 1965
Co-Operative Societies Act 1993 s 71(1)
National Land Code ss 210(1), 214(1), 301(b)(i), 301(b)(ii), 340(2), 340(2)(b), 340(3)(a)
Rules of the High Court 1980 O 18 r 19(1)(a), 19(1)(b), 19(1)(d)
Specific Relief Act 1950 s 38

*Dev Anad (CK Wong with him)(Wong) for the plaintiff.*
*Johar Othman (Mazlan Sengari & Co) for the first defendant.*
*Ahmad Faiz (Assistant State Legal Advisor, Selangor) for the second defendant.*

**Azman Abdullah JC:**

INTRODUCTION

**[1]** This case was fixed for full hearing of the writ of summons on 26 November 2007 (encl 1). Nevertheless, the full hearing did not proceed because there was an application for adjournment by the plaintiff's solicitor. However, the first defendant's solicitor and the second defendant's solicitor objected to the said adjournment. After the court heard both solicitors'

A submissions, the court decided to strike off the plaintiff's action against the first defendant and the second defendant with costs.

BACKGROUND

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**[2]** In this action, the plaintiff's claims are based on an irrevocable power of attorney dated 22 March 1998 ('power of attorney'). In the statement of claim, the plaintiff stated that the first defendant has used the said power of attorney without the plaintiff's knowledge and/or permission and succeeded in making the second defendant to transfer the properties to the second defendant.

C

**[3]** Herein, the plaintiff is a private limited company incorporated under the Companies Act 1965. The first defendant is a co-operative incorporated under the Co-Operative Societies Act 1948 whereas the second defendant is the land administrator of Ulu Langat district.

D

**[4]** Via the said power of attorney, the plaintiff appointed the second defendant as its attorney specifically to do matters specified in the said power of attorney that is with regard to three quarter (3/4) of the undivided share properties each being held under documents of title No EMR 2734 Lot 1022 Mukim Cheras and EMR 2736 Lot 1024 Mukim Cheras (now known as GM 343 Lot 1024 Mukim Cheras) all in the district of Ulu Langat ('properties').

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**[5]** The first defendant has registered the said power of attorney at the second defendant's office on 14 July 1998 via presentation No 161/88 Jil No 16, Folio No 132.

G

**[6]** The plaintiff alleged that the said power of attorney did not at all give the first defendant whether express or implied any authority to sell or to transfer any of the said properties or any parts of it.

H

**[7]** The plaintiff stated that the transfers have breached the provisions of the National Land Code ('Code') on the following grounds:

(i) the said transfers were not executed on a valid power of attorney because the said power of attorney did not give the first defendant the authority to sell therefore the said transfers did not fulfill s 210(1) of the said Code;

I

(ii) the said transfers did not fulfill s 214(1) of the said Code because the said instruments supposedly transfer one share from an undivided share and

(iii) the said transfers were not an eligible instrument to be registered as according to s 301(b)(i) and (ii) of the said Code.

**[8]** The plaintiff stated that as according to s 340(2) of the said Code, the first defendant's title to the properties can be challenged because the properties' transfers were obtained by way of incomplete or invalid instrument.

**[9]** Thus, the plaintiff seeks to enter judgment for the following orders:

(i) a declaration that the transfers of the said properties are an incomplete or invalid instrument as according to s 340(2)(b) of the Code that is —

Presentation No 5236/88 Jil 510 Folio 3 dated 15 July 1988 of title No Lot 1022 EMR 2734 Mukim Cheras District of Ulu Langat.

Presentation No 5236/88 Jil 510 Folio 3 dated 15 July 1988 of title No Lot 1024 EMR 2736 Mukim Cheras District of Ulu Langat.

Presentation No 12566/93 Jil 816 Folio 92 dated 29 December 1993 of title No Lot 1024 GM 343 Mukim Cheras District of Ulu Langat.

(ii) a declaration that the said transfers are revoked under s 38 of the Specific Relief Act 1950;

(iii) a declaration that the first defendant's titles to the said properties are revoked under s 340(3)(a) of the Code and

(iv) general damages, costs and interests.

COURT'S OPINIONS

**[10]** After the court heard both solicitors' submissions, I decided to dismiss the plaintiff's action against the defendant's with costs.

**[11]** I found that at first, this action was filed on 14 November 1995 as originating summons No S1–21–141 of 1995. Nevertheless, on 28 January 1997 the first defendant filed an application to change this originating summons action to a writ action and on 7 March 1997, the first defendant's application was allowed by the honorable judge.

**[12]** On 26 June 1997, the plaintiff filed an application for stay of execution of the said order dated 7 March 1997 until the appeal against the said order was heard and decided and on 11 July 1997, the plaintiff's application was allowed by the honourable judge.

A **[13]** Thereafter, the first defendant filed an application under O 18 r 19(1)(a), (b) and (d) of the Rules of High Court 1980 ('RHC 1980') to strike off the originating summons on the ground that the plaintiff has failed to take any further action to proceed with this case and on 21 September 2000, the said application was allowed by the deputy registrar.

B

**[14]** In relation of the said order, the plaintiff filed a notice of appeal to the judge in chambers dated 22 September 2000 and on 15 February 2001, the honourable judge reinstated this action. The plaintiff thereafter filed writ of summons on 1 March 2001 at the Civil Court Division 7.

C

**[15]** In this matter, I found that even though this suit was filed at the civil division 7, the case was still being carried on at the original action's court ie, the Civil Court Division 1.

D

**[16]** I found that the Civil Court Division 1 had issued a show cause notice before the honorable judge dated 26 March 2003 to the parties. On 6 May 2003 ie, the show cause date, the parties informed the court that after the original action originating summons No S1–21–141 of 1995 was changed to

E writ action and writ of summons filed, this case had two files ie, the file of this suit (S7–21–37 of 2001) and the file of the original action originating summons (S1–21–141 of 1995).

F **[17]** The parties also informed that they had filed bundle of documents as directed by the honorable judge during case management on 13 September 2001. The court then fixed 8 May 2003 as the date of case management for both files.

G **[18]** On 8 May 2003 ie, the date of case management, the parties stated that the bundle of documents were already filed and they were still interested to proceed with this action. Thereafter, the court fixed 10 June 2003 as the next date for case management.

H **[19]** On the said case management date, the parties informed to the court that negotiations of settlement were ongoing and the court fixed 6 October 2003 as the date of case management.

**[20]** On 6 October 2003 ie, the date of case management, the parties

I informed that they were ready and the court fixed 8 December 2003 as the date of case management. On the said case management date, the honorable judge directed this case to be heard at the Civil Court Division 7 as the writ of summons was filed at the Civil Court Division 7. The court then fixed 15 December 2003 as the date of hearing.

**[21]** After this case was transferred to the Civil Court Division 7 starting on 8 December 2003, mention dates and case management dates were fixed many times before the honourable judge and the deputy registrar.

**[22]** I found that this action was struck off on mention date 26 June 2006 due to non attendance of the plaintiff's solicitor after the case stopped on 15 June 2005. On 13 July 2006, the plaintiff filed an application to reinstate this action and on 30 November 2006, the honorable judge allowed the plaintiff's application and the court fixed 26 and 27 February 2007 as the dates of hearing.

**[23]** On 26 February 2007 ie, the hearing dates, the parties were ready to proceed with this action. Nevertheless, the hearing was adjourned because the honorable judge ie, the replacement judge of the Civil Court Division 7 had a pre-2000 case which was ready to proceed. Therefore, the court fixed 26 and 27 November 2007 as the dates of hearing.

**[24]** I found that on the date of hearing 26 February 2007, the first defendant's solicitor informed to the court that he just got an information on that day that the first defendant ie, a co-operative registered on 12 October 1982 its registration had been annulled by an order dated 11 July 2006 under s 71(1) of the Co-operative Act 1993 effective on 12 September 2006 and a liquidator named Chiew Seng Hin had been appointed to represent the first defendant.

**[25]** On 26 November 2007 ie the hearing date, the plaintiff's solicitor informed to the court that the plaintiff was unable to proceed with this action against the defendants because the plaintiff did not have information as to when the properties were sold to the third party and the first defendant was still in the process of liquidation. The plaintiff's solicitor stated that he was appointed in June 2007 and asked for an adjournment.

**[26]** Based on my observation for this action, I am of the view that the plaintiff's solicitor should apply for an adjournment much earlier to the court and not to make such an application on the date of hearing.

**[27]** I found that there was nothing done by the plaintiff's solicitor since the hearing was adjourned on last 26 February 2007. I am of the view that the newly appointed plaintiff's solicitor should get the cause papers and the related documents from the plaintiff's previous solicitor in ensuring that this action can go on as soon as possible.

**[28]** I feel that the plaintiff's solicitor were indifferent and not serious with this case. His attitude also reflects that the plaintiff is not serious to comply with court's instructions and choose to apply for an adjournment on the date fixed for hearing.

**[29]** In this kind of situation, the court has no much choice and other alternative. I am disappointed with the plaintiff's solicitor attitude because the application for an adjournment was not informed earlier to the court as well as the defendants. This has caused prejudices to the defendants and this plaintiff's action has abused the court process, and the court's time. Therefore, I hold that the court must be strict in order to avoid more party to continue with this kind of attitude and at the same time to be my consideration to reduce the court's prevailing backlog cases.

**[30]** This case is a clear case to be struck off from the hearing list, unless the plaintiff takes a proactive step to be ready to proceed with the full hearing as fixed by the court. I would like to stress that the unprepared plaintiff's solicitor nor the plaintiff itself on the said date showed that they were not interested and serious with this case and did not respect to the prevailing system of judiciary.

**[31]** The unprepared plaintiff nor its solicitor to proceed with the case has showed their indifference in handling this case. I would like to draw to the observation of Eusoff Chin in the case of *Tian Yan Onn Development Sdn Bhd v National Holdings Ltd & Ors* [1988] 2 MLJ 669, His Lordship held that:

> If the second defendants are praying for the discretion of the court to be exercised in their favour the very least that they should demonstrate is some display of good faith. I find the second defendants' conduct was consistent with being utterly negligent or else blatantly indifferent. If the court lends its hands in aid of the second defendants now, it would be at the expense and prejudice of the plaintiffs who had taken great pains to do what needs to be done and who are not found to be at fault.

**[32]** Similarly in the case of *Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana* [1982] 1 MLJ 77, Hashim Yeop Sani J expressed his opinion at the Federal Court:

> … The facts of the present case clearly show a lackadaisical attitude towards lawyers' duty to their clients and their duty to the courts. As stated in the grounds of judgment of the learned judge the case had been fixed for hearing about 5 months previously and suddenly on the date of hearing a telegram was received stating not only counsel was unable to obtain a seat in the plane but also the defendant suddenly fell sick. One should also consider the difficult position of the courts in circumstances such as the present case.

**[33]** I also referred to the *Malaysian High Court Practice 1998*, Desk Ed, p 2349, inter alia, stated: A

> If the court is of the opinion that the facts show a lackadaisical attitude on the part of the lawyer in his duty to his client and to the courts, an adjournment will usually be refused. B

**[34]** The plaintiff's solicitor handling this case should be more sensitive towards the cases he handles especially pertaining to preparation and dates of hearing for his cases. C

**[35]** The grounds of adjournment submitted by the plaintiff's solicitor are trivial pertaining to no knowledge as to the sale of the properties to the third party and the first defendant's liquidation which are not considered by the court. Referring to the case of *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129, the Federal Court held that: D

> The *mistake of the appellant's solicitor* did not constitute a sufficient ground for granting the extension of time. E

**[36]** Not just only that, the plaintiff's solicitor attitude reflected the not serious attitude and responsibility to justice that want to be achieved in this action. I am of the opinion that this action can be struck off for want of prosecution if:

(i) if the plaintiff's default is intentional and contemptuous, or F

(ii) if the plaintiff is guilty of an excessive and unforgivable delay as such as it has caused prejudiced to the defendant.

(*Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin* [1998] 4 MLJ 373, referred). G

**[37]** I would like to draw to the observation by the Honorable Mokhtar Sidin in the case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin*, which I quote in its original text in Bahasa Malaysia among others: H

> Sepertimana yang ditunjukkan oleh kes-kes *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd & Ors* dan *Choraria v Sethia*, selain daripada kedua-dua bahagian dalam *Birkett v James*, nampaknya berbangkit satu bahagian yang baru untuk membatalkan tuntutan plaintif atas alasan kelewatan, iaitu, bahawa, dimana terdapat kelewatan yang melampau atau yang tidak dapat dimaafkan yang mana melibatkan ketidak-hirauan yang menyeluruh dan total akan kaedah-kaedah mahkamah, hinggakan membawa kepada satu penyalahgunaan proses, tindakan tersebut boleh dibatalkan atas alasan itu walaupun tanpa sebarang bukti kemudaratan. Dalam keadaan ini, responden dan peguamcaranya telah tidak I

A mengambil sebarang langkah untuk menyelesaikan litigasi tersebut dalam tempoh yang sewajarnya dan telah sesungguhnya tidak menghiraukan jadual masa yang telah diberikan oleh kaedah-kaedah. Kes semasa, dengan itu, sesungguhnya terlingkung atas apa yang telah diputuskan dalam kedua-dua keputusan yang tersebut di atas.

B

**[38]** It is trite law that the court has the authority to strike off cases for want of prosecution as held in the case of *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150, by the Honorable Eusoffe Abdoolcader at the Federal Court that (I quote its original text):

C

> The House of Lords in *Birkett v James* [1978] AC 297, 317, 326 approving the decision of the English Court of Appeal in a trilogy of appeals reported sub nomine *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 245, 268, held that the power of the court to dismiss an action for want of prosecution should be exercised
> D only where the plaintiff's default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant but, other than in a case of contumelious conduct on the plaintiff's part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the House
> E further observed per curiam that where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the time limits
> F prescribed by the rules of court and is inordinate and inexcusable having regard to the delay before the issue of the writ, and the delay after the issue of the writ has caused some additional prejudice to the defendant beyond that already suffered by him by reason of the delay in bringing the action.

G **[39]** I am of the opinion that the plaintiff has wasted a lot of the court's time and were given many chances to continue with its action herein. Based on the arranged chronology as mentioned above, it is clear that the plaintiff's case has been prolonged since 1995, which involves the change from originating summons to writ of summons, the parties' non-compliance with
H the court's instructions to filed the related cause papers, even the court had issued show cause notice because there was no further action taken by the parties for this case especially the plaintiff. Not just only that, what is more disappointing, I found that the plaintiff's solicitor did nothing since the last hearing date on 26 February 2007. I have no alternative, but to strike off this
I plaintiff's action against the first and the second defendant.

**[40]** After I heard both solicitors' submissions and the submitted objections and after I analysed all factors and authorities before me, without hesitation I decided to strike off this action against the first plaintiff and the second defendant with costs.

*Plaintiff's action struck off with costs.*

Reported by Ashgar Ali Ali Mohamed